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## STRUGGLING WITH CALIFORNIA'S KIDNAPING TO COMMIT ROBBERY PROVISION

The California Penal Code contains two kidnaping statutes. Simple kidnaping, defined in section 207, carries a penalty of one to twenty-five years' imprisonment.<sup>1</sup> Section 209,<sup>2</sup> bifurcated in its prescription, defines the offenses which constitute aggravated kidnaping. These offenses are punishable by either life imprisonment, life imprisonment without parole, or death.<sup>3</sup>

Section 207 has remained relatively unchanged since its enactment. In contrast, section 209 has undergone several drastic amendments during its seventy-five year history. The problems accompanying judicial interpretation of these amendments have perplexed the courts and evoked an abundance of legal commentary. Legal attention has centered on the reference in section 209 to an act which has become known as kidnaping for the purpose of robbery.<sup>4</sup>

In 1969, the California Supreme Court decided *People v. Daniels*,<sup>5</sup> which has become a landmark case in the law of kidnaping for robbery.

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1. CAL. PEN. CODE §§ 207-208 (West 1970).

2. "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death in cases in which any person subjected to any such act suffers death, or shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers bodily harm, or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where no such person suffers death or bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under Section 209 as it read prior to September 22, 1951, shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole." *Id.* § 209 (West Supp. 1976).

3. The degree of severity increases in proportion to the physical harm sustained by the victim. When the victim is not injured, the penalty is life imprisonment. From 1933 until 1973, the punishment of either death or imprisonment without parole was within the discretion of the jury in cases in which the victim suffered bodily harm. The 1973 amendment to section 209 removed this decision from the jury's discretion and prescribed the death penalty only in cases in which the victim dies. Cal. Stat. 1973, ch. 719, § 5, at 1299 (codified at CAL. PEN. CODE § 190.2 (West Supp. 1976)).

4. The phrase "kidnaping for robbery" will be used in this note to refer to this particular offense.

5. 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969).

In *Daniels*, the court rejected a prior interpretation of section 209 and established a new judicial interpretation of the term "kidnaping for robbery."<sup>6</sup> Under this new interpretation, the compelled movement of a person during an act of robbery does not constitute kidnaping for robbery if the movement is merely incidental to the robbery or if the kidnaping does not substantially increase the victim's risk of injury beyond the risk inherent in robbery. Although not required by the *Daniels* interpretation, a two-prong test was subsequently developed by the supreme court as a standard for determining whether a victim's movement constitutes kidnaping for robbery. The purpose of this note is to trace the development of kidnaping for robbery, and to evaluate this two-prong test.

Initially, this note will discuss the historical background of aggravated kidnaping. The examination will briefly trace section 209 through its first fifty years of development as California law and then focus specifically on the statutory reference to kidnaping for robbery. The discussion of kidnaping for robbery will concern possible interpretations of the statutory language, judicial analysis culminating in the decision in *Daniels*, and inconsistencies arising in application of the current two-prong test. Finally, a more desirable method of determining kidnaping for robbery will be proposed.

### Historical, Judicial and Legislative Background of Section 209<sup>7</sup>

#### Early Development of Kidnaping

Kidnaping is an ancient crime, punished even under early Jewish<sup>8</sup> and Roman law.<sup>9</sup> At common law, kidnaping was considered false imprisonment aggravated by a conveyance of the victim<sup>10</sup> and was defined as the "forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another."<sup>11</sup> Blackstone referred to kidnaping as an unquestionably heinous crime and felt its consequences to be productive of the most cruel and disagreeable hardships.<sup>12</sup> The punishment for kidnaping at common law was im-

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6. See notes 114-30 & accompanying text *infra*.

7. In construing a statute, the court is free to study the history and purpose of the enactment and the previous legislation on the subject. *County of Los Angeles v. Frisbie*, 19 Cal. 2d 634, 639, 122 P.2d 526, 529 (1942).

8. "He that stealeth a man and selleth him, or if he be found in his hand, he shall surely be put to death." *Exodus* 21:16.

9. See 2 W. BURDICK, *THE LAW OF CRIME* § 384 (1946).

10. See 1 W. HAWKINS, *PLEAS OF THE CROWN* 119 (Curwood ed. 1824); R. PERKINS, *CRIMINAL LAW* 176-77 (2d ed. 1969).

11. 4 W. BLACKSTONE, *COMMENTARIES* \*219.

12. *Id.*

prisonment and pillory.<sup>13</sup>

In the United States commission of the offense, even under the common law, did not require that the victim be carried "into another country" because the various states are foreign to each other for the purpose of kidnaping.<sup>14</sup> Therefore, the customary definition of common law kidnaping in America became the "(1) unlawful and (2) forcible abduction of (3) any person, (4) from one state and taking him into another."<sup>15</sup> Interest in common law kidnaping, however, is now of only historical significance in the United States. All jurisdictions currently punish kidnaping by statutes, some of which have extended the scope of the offense.<sup>16</sup> As in California, most states divide the offense of kidnaping into degrees.<sup>17</sup>

### Simple and Aggravated Kidnaping in California

In 1872, the California legislature codified the offense of kidnaping by enacting penal code section 207. Under this statute, kidnaping was defined as a forcible seizure and carrying away of a victim into another county, state, or country.<sup>18</sup> Section 207 was later amended to include the carrying "into another part of the same county."<sup>19</sup> The penalty for this kidnaping offense was prescribed in section 208 and called for one to ten years' imprisonment.<sup>20</sup> This section 207 offense is

13. *Id.*

14. *See, e.g.,* State v. Rollins, 8 N.H. 550, 567 (1837).

15. 2 W. BURDICK, THE LAW OF CRIME § 386 (1946).

16. *See* People v. Hope, 257 N.Y. 147, 150, 177 N.E. 402, 403 (1931).

17. *See, e.g.,* ILL. ANN. STAT. ch. 38, §§ 10-1 to -2 (Smith-Hurd 1972); N.Y. PEN. LAW §§ 135.20, 135.25 (McKinney 1975); TEX. PENAL CODE ANN. §§ 20.03-.04 (1974).

18. "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state or county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim according to the laws of the United States or of this state, or who hires, persuades, entices, decoys or seduces by false promises, misrepresentations or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person, is guilty of kidnaping." CAL. PEN. CODE § 207 (1872) (enacting Crimes and Punishment Act, Cal. Stat. 1850, ch. 99, §§ 53-55, at 234), *as amended*, CAL. PEN. CODE § 207 (West 1970). *See* People v. Chu Quong, 15 Cal. 332, 333 (1860) (abduction must be accompanied by removal into another county, state, or territory, or design to remove beyond state limits).

19. Cal. Stat. 1905, ch. 493, § 1, at 653. The advisability of this change was shown by a supreme court decision in a case in which the victim was abducted and carried from San Pedro, across twenty miles of ocean, to Santa Catalina Island. Since both locales were within the county of Los Angeles, the act did not technically constitute kidnaping under the 1872 statute. *See Ex parte Keil*, 85 Cal. 309, 24 P. 742 (1890).

20. CAL. PEN. CODE § 208 (1872), *as amended*, (West 1970). Since 1923, the penalty for simple kidnaping has been from one to twenty-five years' imprisonment. *Id.* § 208 (West 1970).

commonly referred to as simple kidnaping,<sup>21</sup> because the statute does not require that the kidnaping be committed for any specific purpose.<sup>22</sup>

As kidnapings for ransom began to attract nationwide attention,<sup>23</sup> some states enacted statutes which provided harsher punishments for such acts than were available for simple kidnaping.<sup>24</sup> In 1901, the California legislature added section 209 to the penal code to prohibit the carrying away of any person for the purpose of pecuniary gain.<sup>25</sup> Section 209 prohibited (1) the asportation of a victim with the intent to commit extortion or robbery, and (2) the asportation of a victim with the intent to demand ransom. The penalty for such acts was made more severe than the penalty for simple kidnaping.<sup>26</sup> While this 1901 version of section 209 did not use the term "kidnaping," the offenses proscribed by the provision have been termed "aggravated kidnapings."<sup>27</sup> Significantly, while aggravated kidnaping differed from simple kidnaping in the severity of its punishment and the necessity for a specific intent to extort, rob, or demand ransom, the gravamen of both section 207 and section 209 was a traditional asportation requirement.

### 1932: Kidnaping as a Federal Offense

In the 1920's, kidnapings for ransom occurred at an alarming rate.<sup>28</sup> The professional criminals of the Prohibition era, taking advantage of the inadequacies of the law and public indifference, kidnaped

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21. Simple kidnaping is distinct from aggravated kidnaping. The latter term describes a kidnapping which has, in addition to the kidnaping itself, another criminal object. See notes 25-27 & accompanying text *infra*.

22. Prior to the enactment of section 207 in 1872, kidnaping for ransom was apparently uncommon. See Fisher & McGuire, *Kidnaping and the So-Called Lindbergh Law*, 12 N.Y.U.L.Q. REV. 646, 649 (1935) [hereinafter cited as Fisher & McGuire].

23. Up until this time, the country was so sparsely settled, and communication facilities were so primitive, that little attention was paid to the rare instances of kidnaping except by the inhabitants of the particular locales in which they occurred. See *id.* at 649-50.

24. See, e.g., Ill. Stat. 1901, § 1, at 145.

25. "Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, is guilty of a felony, and shall be punished therefor by imprisonment in the state's prison for life, or any number of years not less than ten." Cal. Stat. 1901, ch. 83, § 1, at 98.

26. The maximum penalty for simple kidnaping was ten years' imprisonment. See note 20 *supra*. The punishment for this section 209 offense was imprisonment for ten years to life. Cal. Stat. 1901, ch. 83, § 1, at 98.

27. 1 B. WITKIN, CALIFORNIA CRIMES, § 355, at 326 (1963).

28. See Findley, *The Lindbergh Law*, 28 GEO. L.J. 908, 909 (1940). During this decade arose the famous Leopold and Loeb case, which was defended by Clarence Darrow. See generally H. HIGDON, *THE CRIME OF THE CENTURY* (1975).

citizens to extort large sums of money.<sup>29</sup> The abduction of the Lindbergh baby in 1932 aroused nationwide sentiment against these commonplace kidnappings for ransom.<sup>30</sup>

The Federal Kidnaping Act,<sup>31</sup> commonly called the Lindbergh Law, was enacted at the peak of this public outrage.<sup>32</sup> Kidnaping had become a science with the "[d]etails of the seizures and detentions . . . fully and meticulously worked out in advance,"<sup>33</sup> and "[r]ansom was the usual motive."<sup>34</sup> The federal law was designed to enable federal assistance in interstate kidnaping cases in order to compensate for the inadequacies of local police agencies.<sup>35</sup> The punishment originally prescribed by the Federal Kidnaping Act was imprisonment for any term of years to be decided by the court.<sup>36</sup> Shortly after the law was enacted, in an effort to deter physical abuse of the victim, the range of sanctions available to the court was broadened to include the death penalty unless the victim was liberated unharmed.<sup>37</sup> The federal statute also included the requirement that the victim be held specifically for ransom or reward.<sup>38</sup> Thus, the Federal Kidnaping Act differed from both California's simple kidnaping statute, which required no specific purpose for the kidnapping,<sup>39</sup> and California's aggravated kidnaping

29. The criminal entrepreneurs of this era had used kidnaping as a means of enforcing their underworld code. With this experience, they were able to use kidnaping for ransom as a highly sophisticated and lucrative business. *See generally* E. SULLIVAN, *THE SNATCH RACKET* (1931).

30. *See* Findley, *The Lindbergh Law*, 28 GEO. L.J. 908, 910 (1940).

31. "[W]hoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward shall, upon conviction, be punished by imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine . . . ." Act of June 22, 1932, Pub. L. No. 72-189, 47 Stat. 326, as amended, 18 U.S.C. § 1201 (Supp. IV, 1974) (emphasis added).

32. In December 1931, three months before the kidnaping of the Lindbergh baby, identical bills, S. 1525 and H.R. 5657, had been introduced in the respective houses of Congress. *See* S. 1525, 72d Cong., 1st Sess. (1931); H.R. 5657, 72d Cong., 1st Sess. (1931). After the kidnaping, action on these bills was delayed owing to fear that an increased likelihood of arrest or a heavily increased penalty enacted at that time would prevent the safe return of the child. *See* 75 CONG. REC. 13285, 13291 (1932).

33. *Chatwin v. United States*, 326 U.S. 455, 463 (1946).

34. *Id.*

35. Detection and apprehension of kidnapers by local officials was seriously hampered when criminals crossed a state line and thereby terminated, for all practical purposes, the jurisdiction and ability to arrest of their pursuers. *See Hearings on H.R. 5657 Before House Comm. on the Judiciary*, 72d Cong., 1st Sess., ser. 4 (1932). *See also* 75 CONG. REC. 13285, 13291-92 (1932).

36. Act of June 22, 1932, Pub. L. No. 72-189, 47 Stat. 326 (codified at 18 U.S.C. § 1201 (Supp. IV, 1974)).

37. Act of May 18, 1934, Pub. L. No. 73-232, 48 Stat. 781.

38. *See* note 31 *supra*.

39. *See* note 21 & accompanying text *supra*.

statute, which specified as alternative purposes of the crime the intents to demands ransom, to commit extortion, and to commit robbery.<sup>40</sup>

### 1933: Amendment to California's Aggravated Kidnaping Law

In 1933, one year after enactment of the federal kidnaping legislation, the California legislature amended section 209. This amendment severely harshened the sanction of section 209 by raising the minimum penalty to life imprisonment, with the augmented penalties of either life imprisonment without parole or death if the victim was injured.<sup>41</sup> Moreover, the wording of the amendment drastically changed the nature of the offense—a result which the legislature apparently did not intend.<sup>42</sup>

The language of the 1933 amendment evidenced a heavy reliance upon the Federal Kidnaping Act.<sup>43</sup> The California legislature did not, however, include the federal law's requirement of asportation in its amendment to section 209.<sup>44</sup> This exclusion of asportation as an absolute requirement was not entirely illogical. The California legislature was probably concerned primarily with ransom abduction, the focus of the Federal Kidnaping Act. This offense can occur without asportation of the victim.<sup>45</sup> In fact, the requirement of asportation in the federal enactment was apparently inserted to provide federal jurisdiction under the commerce clause.<sup>46</sup> Nevertheless, in the context of section

40. See notes 25 & accompanying text *supra*.

41. "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm." Cal. Stat. 1933, ch. 1025, § 1, at 2617-18 (emphasis added).

42. See notes 52-54 & accompanying text *infra*.

43. Compare the italicized portion of note 31 *supra*, with the italicized portion of note 41 *supra*.

44. Kidnaping and other acts involving asportation, as well as acts not requiring movement of the victim, were included within the 1933 amendment. Since the acts were listed in the alternative, asportation was not a requirement for violation of section 209. See note 41 *supra*.

45. "[W]henever a victim is seized for the purpose of ransom, reward, extortion, or exacting something of value from friends or relatives, no asportation of the victim is necessary to constitute a violation of section 209." *People v. Macinnes*, 30 Cal. App. 3d 838, 844, 106 Cal. Rptr. 589, 592 (1973). The Model Penal Code is in agreement: "There are cases where the victim is held in a place of isolation for a substantial period. Thus, a man might be seized in his own summer home in the mountains and held there for ransom." MODEL PENAL CODE § 212.1, Comment 2 (Tent. Draft No. 11, 1960).

46. See *Bailey v. United States*, 74 F.2d 451, 453 (10th Cir. 1934). For a

209, elimination of the asportation requirement had a fundamental and somewhat startling effect. As amended, the statute proscribed: seizing, confining, inveigling, enticing, decoying, abducting, concealing, kidnapping, carrying away, holding or detaining.<sup>47</sup> Moreover, unlike the federal law, section 209 was not limited to the intent to demand ransom; the 1933 amendment, like the original version of section 209, included as well the intent to commit extortion or robbery.<sup>48</sup>

It was this retention of intent to commit robbery, coupled with the addition of acts not requiring asportation, that produced the unusual result in the 1933 amendment. Under the wording of the amendment, any of the specified acts constituted a violation of section 209 when accompanied by any of the specified intents. Thus, the mere holding of an individual to commit robbery constituted a section 209 offense.<sup>49</sup> This result represented a dramatic departure from the proscription of the 1901 version of the statute. Prior to 1933, an act of robbery evoked the sanctions of section 209 *only if* the robbery included an asportation of the victim.<sup>50</sup> In such a case, the act of robbery was punished under section 213, governing robbery, and section 209 applied as well, because the offender had carried away the victim with the intent to commit robbery. Under the 1933 amendment, however, *every* act of robbery violated section 209. Since any act of robbery included a holding or detention for that purpose, even a standstill robbery was punishable as both robbery under section 213 and aggravated kidnapping under section 209.<sup>51</sup>

The legislature probably did not intend to broaden the scope of section 209 to encompass standstill robberies.<sup>52</sup> The legislative counsel's report<sup>53</sup> to the governor enumerated only three effects of the amendment: (1) the penalty would be increased; (2) an accomplice who aided in any part of the crime would be guilty as a principal; and

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discussion of the Lindbergh Law's reliance upon the commerce clause to bring kidnapping within federal jurisdiction see Fisher & McGuire, *supra* note 22, at 656.

47. Cal. Stat. 1933, ch. 1025, § 1, at 2617.

48. *Id.*

49. "Every person who . . . holds or detains, such individual . . . to commit extortion or robbery . . . is guilty of a felony . . ." *Id.*

50. Cal. Stat. 1901, ch. 83, § 1, at 98.

51. See notes 55-76 & accompanying text *infra*.

52. Assemblyman C. W. Lyon, member of the Judiciary Committee of the 1933 legislature, was present at all discussions of the amendment on the assembly floor and in the Judiciary Committee. In a sworn statement, Assemblyman Lyon commented, "Simple detention during a robbery was never discussed before the Committee, and it was not our intention to make such detention kidnapping." Comment, *Robbery Becomes Kidnaping*, 3 STAN. L. REV. 156, 159 (1950), quoting Affidavit of Charles W. Lyon, Supplemental Exhibits for the Appellant at 3, *People v. Chessman*, 38 Cal. 2d 166, 238 P.2d 1001 (1951).

53. See generally CAL. GOV'T CODE §§ 10230-46 (West 1966 & Supp. 1976).



(3) the requirement that the act be done maliciously would be omitted.<sup>54</sup> If the legislature had intended to alter completely the nature of aggravated kidnaping by wholly eliminating the requirement of asportation, the legislative counsel's report would certainly have reflected this fundamental change.

#### Initial Judicial Treatment of Section 209's 1933 Amendment

*People v. Tanner*<sup>55</sup> was the first case in which the supreme court considered the effect of the 1933 amendment on the asportation requirement and the other elements of section 209. The defendants in *Tanner* forced the victim at gunpoint from his driveway into his house. There they tortured and interrogated him for over an hour about the location of money they believed he had hidden. On appeal from their convictions under section 209, the defendants objected to the validity of the 1933 amendment, arguing that the acts described in section 209 widely departed from the common law requirement of carrying away the victim. In affirming the defendants' convictions,<sup>56</sup> the court in *Tanner* rejected this argument and held the 1933 amendment valid.<sup>57</sup> The court stated that the common law definition of kidnaping had long since become obsolete and that the legislature owed no allegiance to such an archaic form.<sup>58</sup>

The defendants in *People v. Raucho*<sup>59</sup> mounted a similar challenge to the 1933 amendment in an effort to reverse their convictions for aggravated kidnaping. These convictions were based on two sidewalk holdups during which the victims were moved across the street. The defendants contended that the 1933 amendment to section 209 required both a seizing and a carrying away of the victim. The court in *Raucho* rejected this contention, pointing out that "the statute plainly declares that either the seizing or the kidnaping or carrying away is a felony under its provisions, where the intent to commit robbery appears."<sup>60</sup>

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54. CALIFORNIA LEGISLATIVE COUNSEL, REPORT ON ASSEMBLY BILL NO. 334 (1933), quoted in *People v. Knowles*, 35 Cal. 2d 175, 200, 217 P.2d 1, 16 (1950).

55. 3 Cal. 2d 279, 44 P.2d 324 (1935).

56. The court in *Tanner* was not required to hold that a mere detaining for robbery constituted aggravated kidnaping, since the crime in question had involved a fifty-foot asportation and would thus have been punishable under the provisions of the original section. The court in *Tanner* admitted that "so far as it affects the appellants herein [the amendment to section 209] relates only to increased punishment." *Id.* at 294, 44 P.2d at 331.

57. *Id.* The court in *Tanner* also commented on the removal of the requirement of asportation from section 209: "The section as amended provides that every person who seizes, confines, kidnaps or who holds or detains any person for the purpose of committing extortion or robbery is guilty of a felony." *Id.*

58. *Id.* at 296, 44 P.2d at 332.

59. 8 Cal. App. 2d 655, 47 P.2d 1108 (1935).

60. *Id.* at 663, 47 P.2d at 1112.

The court reasoned further that the 1933 amendment changed section 209 from an offense "which required the asportation of the victim to one in which the act of seizing [the victim] for ransom, reward or to commit extortion or robbery became a felony."<sup>61</sup>

The courts in both *Tanner* and *Raucha* suggested that section 209 could be violated without a movement of the victim. Nevertheless, the facts of both *Tanner* and *Raucha* involved asportation of the victims. Thus, neither court was squarely confronted with a conviction of aggravated kidnaping based on a robbery in which the victim remained stationary. Not until 1950 did a case arise in which prosecution under section 209 depended upon the portion of the 1933 amendment which made a mere *holding* or *detaining* for robbery an aggravated kidnaping.

### People v. Knowles: Aggravated Kidnaping Without Asportation

In 1950, the supreme court considered the case of *People v. Knowles*,<sup>62</sup> which concerned convictions under section 209 in circumstances involving only minimal movements of the victims. The holding of the supreme court in *Knowles*, while strictly a literal interpretation of the statute, shook the legal community.<sup>63</sup> In *Knowles*, the owner and the clerk of a clothing store were forced into a stockroom, where the defendant took their wallets. The defendant's accomplice, Chessman<sup>64</sup> forced the clerk to open the cash register, from which additional money was taken. Prior to the robbers' escape, the defendant struck the owner on the head with the barrel of his gun.<sup>65</sup> The court in *Knowles* affirmed the defendant's aggravated kidnaping convictions, but reversed his robbery convictions.<sup>66</sup>

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61. *Id.*

62. 35 Cal. 2d 175, 217 P.2d 1 (1950).

63. See Comment, *Judicial Construction of Kidnaping Statutes*, 15 ALBANY L. REV. 65 (1951); Comment, *Robbery Becomes Kidnaping*, 3 STAN. L. REV. 156 (1950); 38 CAL. L. REV. 920 (1950); 24 S. CAL. L. REV. 310 (1951).

64. Chessman was tried separately. See notes 94-101 & accompanying text *infra*.

65. 35 Cal. 2d at 178, 217 P.2d at 2. This assault was the basis for the finding that one aggravated kidnaping had involved bodily harm to the victim. Accordingly, Knowles could have been punished by either death or life imprisonment without parole. The jury sentenced Knowles to life imprisonment without parole. *Id.* at 177, 217 P.2d at 2.

66. *Id.* at 189, 217 P.2d at 9. The court held that since Knowles's convictions were based on the commission of a single act, Penal Code section 654 precluded punishment for both robbery and aggravated kidnaping: "Since he committed only a single, indivisible act, Penal Code, section 654, requires that he be punished only once therefor. In view of the fact that the Legislature prescribed greater punishment for the violation of section 209 it must be deemed to have considered that the more serious offense, and the convictions thereunder must be the ones affirmed." *Id.* at 189, 217 P.2d at 9.

Writing the opinion for a sharply divided court,<sup>67</sup> Justice Traynor rejected the defendant's contention that section 209 applied only to orthodox kidnappings which entailed an asportation rather than the mere detention of a victim during an armed robbery. Upon examining the language of the statute, Justice Traynor stated that movement of the victim was only one of several methods by which section 209 could be violated. In his view, the 1933 amendment deliberately abandoned the requirement of movement of the victim which had originally characterized aggravated kidnapping.<sup>68</sup> Although apparently questioning the equity of a literal interpretation of section 209,<sup>69</sup> Justice Traynor found no basis for concluding that the legislature had not meant what it had said. Since the words of the statute were easily understood, Justice Traynor reasoned, the court should not convolute those words to accomplish a purpose which did not appear on the face of the statute.

The majority in *Knowles* also held that the standstill robbery in the case at bar violated section 211, the robbery provision, as well as the aggravated kidnapping section.<sup>70</sup> Since the violation of these two offenses rested upon the commission of a single act, however, punishment was necessarily restricted to a single provision.<sup>71</sup> The court in *Knowles* recognized this limitation and chose the sanctions of section 209, stating: "In view of the fact that the Legislature prescribed greater punishment for the violation of section 209 it must be deemed to have considered that the more serious offense, and the convictions thereunder must be the one affirmed."<sup>72</sup>

Justice Edmunds, with Chief Justice Gibson concurring, dissented in *Knowles* to the convictions for aggravated kidnapping. He labeled the majority interpretation of section 209 a "startling innovation in criminal law" under which an act of robbery is also kidnapping.<sup>73</sup> In a grammatical and historical examination of the aggravated kidnapping provision, Justice Edmunds maintained that the 1933 amendment clear-

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67. *Knowles* resulted in a 4-3 split on the court. For a discussion of the dissenting opinions see notes 73-76 & accompanying text *infra*.

68. 35 Cal. 2d 182, 217 P.2d at 5.

69. Justice Traynor apparently realized that this interpretation, which punished armed robbery as aggravated kidnapping, would meet with disfavor: "Reasonable men may regard the statute as unduly harsh and therefore unwise; if they do, they should address their doubts to the Legislature. It is not for the courts to nullify a statute merely because it may be unwise." *Id.* at 180, 217 P.2d at 3.

70. *Id.* at 186, 217 P.2d at 7. The majority in *Knowles* did not, however, hold that *all* robberies violated section 209. Rather, the majority emphasized that the robbery had lasted fifteen or twenty minutes. Justice Traynor felt this circumstance clearly indicated that the victims had been "held and detained" to commit robbery. See *id.* at 181, 217 P.2d at 4.

71. See CAL. PEN. CODE § 654 (West 1970).

72. 35 Cal. 2d at 89, 217 P.2d at 9.

73. *Id.* at 190, 217 P.2d at 9-10 (Edmunds, J., dissenting).

ly indicated that one could commit robbery without also committing a kidnaping. Justice Edmunds felt that the severe punishment provided in section 209 was an obvious indication that detention incidental to robbery did not constitute aggravated kidnaping.<sup>74</sup>

In a separate dissenting opinion, Justice Carter agreed with Justice Edmunds's dissenting view that the severity of the sanctions in section 209 should be reserved for the more classical kidnapings. Justice Carter also felt the majority in *Knowles* made every robbery a violation of both the robbery statute and the aggravated kidnaping statute,<sup>75</sup> thereby giving the district attorney the power to prosecute acts of robbery with the sanctions of either section. Justice Carter reasoned that this power was unwarranted because the legislature did not intend to punish acts of robbery with the severe sanctions provided for aggravated kidnaping.<sup>76</sup>

### Inception of "Kidnaping for Robbery"

The decision in *Knowles* seemed to awaken the legal community to the inadequacies of the 1933 amendment to section 209: The sanctions of section 209 could be applied to *every* act of robbery rather than imposed as an additional penalty when the robber carried away the victim. Accordingly, a standstill robbery could be punished under section 209 with a minimum term of life imprisonment,<sup>77</sup> while the robbery statutes prescribed a minimum penalty of one year's imprisonment for the same act.<sup>78</sup>

Legal commentators strongly objected to the *Knowles* decision and urged the court to seek the spirit of the law and to avoid constructions leading to absurdities.<sup>79</sup> Yet an emphatic statement by Justice Traynor in the majority opinion in *Knowles* indicated that any interpretive change would have to be made by the legislature.<sup>80</sup> Consequently, the

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74. See *id.* at 196, 217 P.2d at 14. "Unquestionably, the Legislature has the power to make either attempted robbery or robbery a capital offense. But in my opinion, considering both the language and historical background of section 209, it has not done so." *Id.* at 191, 217 P.2d at 10 (Edmunds, J., dissenting).

75. *Id.* at 203, 217 P.2d at 18.

76. "On the contrary, it is clear that [the legislature] did not intend to embrace the crime of robbery in section 209 of the Penal Code . . . . The Legislature has carefully defined robbery and fixed its punishment . . . . If it had intended to depart from those provisions, it would have done so directly by amending the robbery statute. It would not have attempted to achieve that result by amending section 209, the kidnap statute." *Id.* at 204, 217 P.2d at 18 (Carter, J., dissenting).

77. CAL. PEN. CODE § 209 (West 1970 & Supp. 1976).

78. *Id.* § 213 (West 1970).

79. See, Comment, *Judicial Construction of Kidnaping Statutes*, 15 ALBANY L. REV. 65 (1951); Comment, *Robbery Becomes Kidnaping*, 3 STAN. L. REV. 156 (1950); 38 CAL. L. REV. 920 (1950); 24 S. CAL. L. REV. 310 (1951).

80. See note 69 *supra*.

legislature responded to *Knowles* almost immediately, amending section 209 in the next regular legislative session.<sup>81</sup> This 1951 amendment, however, was not a panacea.

### The 1951 Amendment to Section 209

The most logical solution available to the legislature was to return section 209 to its former status as strictly an aggravated kidnaping statute which imposed harsh penalties for kidnapings committed in conjunction with the specific intent to rob, extort, or hold for ransom. Such a result could best have been achieved by excising from section 209 the activities not involving asportation and enacting a separate statute to punish the holding of a person for ransom. Thus, robbery, extortion, and holding for ransom would not have been punishable under section 209 unless they involved asportation; however, each act would in any case have been punishable under a statute directed solely at the specific offense.

The legislature's 1951 amendment, however, simply repeated the proscription against commission of the enumerated acts, which included mere holding and detaining as well as kidnaping, when the underlying intent was to demand ransom.<sup>82</sup> The only actual amendment was the deletion of the intent to commit robbery from this proscription and the requirement of an asportation when the intent was to commit robbery. The product of this legislative action was the phrase: "any person who kidnaps or carries away any individual to commit robbery."<sup>83</sup> Thus, by no longer punishing the mere holding of a person with the intent to commit robbery, the 1951 amendment prohibited the application of section 209 to a standstill robbery and created the specific offense of kidnaping for robbery.

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81. "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole." Cal. Stat. 1951, ch. 1749, § 1, at 4167.

82. *See id.*

83. Hereinafter, the phrase "kidnaps . . . to commit robbery" will be used to refer to this statutory language.

As a result of the 1951 amendment, section 209 defines two fundamentally different offenses:

(1) "Ransom Abductions": the seizing (holding *or* carrying away) of a person with the intent to demand ransom from a different person; and

(2) "Kidnapings for Robbery": the asportation of a person with the intent to commit robbery.<sup>84</sup>

While a ransom abduction therefore qualifies as aggravated kidnapping, there is no requirement that the victim be carried away.<sup>85</sup> On the other hand, an act of robbery triggers the applicability of section 209 only if there has been an asportation of the victim.<sup>86</sup> In such a case, conviction of both robbery and aggravated kidnapping is permissible, since the offenses do not rest on a single indivisible act.<sup>87</sup>

The court has experienced little or no difficulty with ransom abductions under section 209. The phrase "kidnaps . . . to commit robbery," however, has been troublesome because it is imprecisely and ambiguously worded. The remainder of this note specifically focuses on the offense of kidnapping for robbery, which has remained unaltered by the legislature since the 1951 amendment.

#### Interpretive Possibilities of "Kidnaps . . . To Commit Robbery"

The meaning of kidnapping for robbery is inadequately described by the twelve-word phrase contained in section 209. For example, nowhere in section 209 does the legislature define the term "kidnaps." At least three different definitions can logically be attached to this term. The legislature might have intended kidnaps to mean *any* movement whatsoever. Perhaps, however, the legislature envisioned the common law definition, which requires an asportation into another state. A third possibility is that the legislature referred to kidnaps in section 209 according to the definition of simple kidnapping in section 207.

Even if any particular definition of kidnaps is assumed to be correct, the meaning of "kidnaps . . . to commit robbery" remains nebulous. Since the legislature failed to state the circumstances under which such a kidnapping violates section 209, the applicability of the statute is debatable. For instance, one can interpret the statute as requiring the existence of certain factors in addition to the mere presence of the intent to commit robbery before such a kidnapping is punishable under section 209. On the other hand, the statute can be read to

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84. See *People v. Macinnes*, 30 Cal. App. 3d 838, 844, 106 Cal. Rptr. 589, 593 (1973).

85. See *id.*

86. See *id.*

87. See CAL. PEN. CODE § 654 (West 1970).

apply the sanctions of section 209 every time such a kidnaping is committed for the purpose of robbery. Because the legislature failed to provide any guideline in this regard, one can only speculate as to the legislative intent underlying the offense. Three different applications are reasonable:

*Automatic Application:* The legislature might have intended to use the severe sanctions of section 209 to penalize any kidnaping for the purpose of robbery. This application would give "kidnaps . . . to commit robbery" a broad scope because the kidnap victim could be a bystander rather than the robbery victim; also, the asportation could occur either before or after the booty was obtained. Furthermore, the robber would commit aggravated kidnaping even if asportation is not necessary to obtain the booty, but is used merely to aid escape or to frustrate apprehension. Even if the assailant inadvertently moves the victim, he could be guilty of kidnaping for robbery.

This interpretation is supported by a literal reading of the amendment, which states that "any person who kidnaps or carries away any person to commit robbery" violates section 209. The only explicit requirement for the kidnaping is the motivation of robbery. In fact, the amendment's language plainly rejects the requirement that the kidnap victim be moved with the intention of robbing "such individual."<sup>88</sup> Also, since an act of robbery continues until the robber has reached a place of relative safety,<sup>89</sup> it would seem that the movement could occur before or after the seizure of the booty. If the movement can occur after the booty is seized, the movement need not be essential to acquiring the booty. Under this automatic application, then, the severe sanctions of section 209 would punish the kidnaping of any person during any stage of a robbery.

*Restrictive Application:* Perhaps the legislature intended kidnaping for robbery to apply only to kidnappings which are absolutely necessary to commit the robbery. Under this reading of the statutory language, "kidnaps . . . to commit robbery" would be restricted to the factual situation in which (1) the property is not within the victim's immediate possession,<sup>90</sup> so that (2) asportation is necessary to unite the victim with

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88. Prior to the 1951 amendment, section 209 had always required that the act of kidnaping an individual be accompanied by the intent to rob "such individual." See notes 25, 41 *supra*. This language was not repeated in the 1951 amendment. See note 81 *supra*.

89. See *People v. Carroll*, 1 Cal. 3d 581, 585, 463 P.2d 400, 402, 83 Cal. Rptr. 176, 178 (1970).

90. The phrase "immediate possession" is used here as it is defined in the context of robbery. The restrictive interpretation does not apply to those robberies in which the desired booty, prior to asportation, is: (1) on the body of the victim; or (2) so within his reach, inspection or control that he could, if not prevented by violence or fear, retain possession of it. R. PERKINS, *CRIMINAL LAW* 278-79 (2d ed. 1969).

the desired booty. In this factual situation, the kidnap victim and robbery victim are necessarily the same person, and the asportation must necessarily occur before the act of seizing the booty. In addition, the kidnaping is essential to the robbery because the property is not available at the place of initial confrontation.

This restrictive application is supported by the history of the statute and the language and purpose of the amendment. Prior to 1951, section 209 had always required that the kidnap victim be the intended or actual robbery victim.<sup>91</sup> Perhaps the legislature assumed this requirement would continue under the 1951 amendment. The requirement that the kidnaping must come before the booty is obtained finds support in the language "to commit robbery." An act of robbery is committed at the moment the booty is seized. Therefore, if the booty could be seized without asportation, or if the movement comes after the booty is seized, the purpose of the asportation is to facilitate rather than to commit robbery. Finally, the amendment sought to avoid the result allowed by the decision in *Knowles* of applying section 209 to every act of robbery.<sup>92</sup> Since almost every robbery entails movement,<sup>93</sup> it is reasonable to assume that the amendment was intended to reserve kidnaping for robbery for movements which are essential rather than optional.

*Selective Application:* The intention of the legislature may have been to apply the sanctions of section 209 to any kidnaping which creates additional dangers over and above the dangers caused by robbery. Under this third interpretation, the applicability of "kidnaps . . . to commit robbery" would not depend on who is kidnaped or at what point during the robbery the kidnaping takes place, nor would an inquiry be required in each case into whether the movement is necessary to obtain the booty. This approach is similar to the automatic application except that more would be required under selective application than the kidnaping of some person for robbery: only those kidnappings which increase the dangers over those attributable to robbery would constitute kidnaping for robbery. Since the assailant will be punished in any case for the act of robbery, a selective application would attach the additional penalties of section 209 only when the kidnaping is so significant that it creates additional dangers.

#### **People v. Chessman: Initial Judicial Treatment of "Kidnaps . . . To Commit Robbery"**

"Kidnaps . . . to commit robbery," as found in section 209 since

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91. See note 88 *supra*.

92. See notes 73-77 & accompanying text *supra*.

93. See *People v. Levy*, 15 N.Y.2d 159, 164, 204 N.E.2d 842, 844, 256 N.Y.S.2d 793, 796 (1965); Enright, *California's Aggravated Kidnaping Statute—A Need for Revision*, 4 SAN DIEGO L. REV. 285 (1967).



the 1951 amendment, was first interpreted by the supreme court in the case of *People v. Chessman*.<sup>94</sup> The court's definition of the word "kidnaps" and implementation of the phrase "kidnaps . . . to commit robbery" in *Chessman* gave the offense a broad interpretation.

Caryl Chessman<sup>95</sup> was convicted in a consolidated case of 17 felonies, four of which were kidnaping for robbery. Two of these kidnaping for robbery charges arose from the clothing store robbery committed with Knowles.<sup>96</sup> The other two section 209 convictions involved the robbery and abduction of women who were compelled by Chessman to submit to sex crimes. For these latter two incidents, Chessman was convicted of kidnaping for robbery with infliction of bodily harm and received the death penalty. All the judgments were affirmed by the supreme court on appeal.<sup>97</sup>

In considering the defendant's convictions of kidnaping for robbery, the supreme court in *Chessman* commented upon the effect of the 1951 amendment to section 209,<sup>98</sup> noting, "The detention of the victim during the commission of an armed robbery, if committed since the 1951 amendment, is not punishable under section 209."<sup>99</sup> This exclusion of standstill robberies from the scope of section 209 was clearly indicated by the amendment. The meaning of "kidnaps . . . to commit robbery," however, was subject to judicial interpretation. The court in *Chessman* construed that language broadly, stating that "[i]t is the fact, not the distance of forcible removal which constitutes kidnaping . . . ."<sup>100</sup> Furthermore, since the mere fact of movement was sufficient, the court apparently gave "kidnaps . . . to commit robbery" an automatic application. The *Chessman* court, consequently, made almost every robber subject to the severe sanctions of aggravated kidnap-

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94. 38 Cal. 2d 166, 238 P.2d 1001 (1951).

95. See generally F. PARKER, CARYL CHESSMAN: THE RED LIGHT BANDIT (1975).

96. See text accompanying notes 62-65 *supra*.

97. 38 Cal. 2d at 193, 238 P.2d at 1017.

98. Chessman's violations of section 209 occurred prior to the 1951 amendment. Chessman argued, however, that the 1951 amendment showed a legislative intent that an armed robbery committed between the 1933 and 1951 amendments not be punishable under section 209 if the judgment of conviction was not final as of the 1951 amendment. The court agreed that the amendment had retroactive effect and would apply to the two death penalties if the defendant's conduct had been no more than robbery with infliction of bodily harm. The court held, however, that Chessman's acts had been more than mere armed robbery, as he had kidnaped and carried away two of the victims. Because this conduct remained punishable after the 1951 amendment, there was no reason for reversal. See *id.* at 191-93, 238 P.2d at 1016-17.

99. *Id.* at 191, 238 P.2d at 1016. The court also held that under the second paragraph of the amended statute, all persons (such as Knowles) held under sentences of life imprisonment without possibility of parole for section 209 violations prior to the amendment were eligible for parole. See *id.*

100. *Id.* at 192, 238 P.2d at 1017 (emphasis added).

ing, since almost every robbery involves at least some slight movement.<sup>101</sup>

In *People v. Wein*,<sup>102</sup> the supreme court followed the *Chessman* rule that kidnaping for robbery was dependant upon only the fact of movement and not the distance traveled.<sup>103</sup> The court in *Wein* affirmed the defendant's convictions on five counts of kidnaping for robbery.<sup>104</sup> These convictions arose from the defendant's acts of raping and robbing several women within the confines of their homes, forcing each to move no more than from one room to another or across a single room.

When the defendant in *Wein* contended that the movement of the victims was not sufficient to establish kidnaping under section 209, the court cited *Chessman* and held:

Here, the testimony of some of the victims fixed the amounts of movement at distances ranging from a few feet up to more than 50 feet. Under the reasoning and language of the *Chessman* case, any of these distances sufficed for a conviction under [section 209].<sup>105</sup>

Thus, *Wein* restated the *Chessman* view that kidnaping for robbery could be established by even a slight movement.<sup>106</sup> In addition, the result in *Wein* showed that the entire act of kidnaping could be committed within the confines of one room.<sup>107</sup>

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101. *People v. Levy*, 15 N.Y.2d 159, 164, 204 N.E.2d 842, 844, 256 N.Y.S.2d 793, 796 (1965). Enright, *California's Aggravated Kidnaping Statute—A Need for Revision*, 4 SAN DIEGO L. REV. 285 (1967).

102. 50 Cal. 2d 383, 326 P.2d 457 (1958).

103. See *id.* at 399-400, 326 P.2d at 466. The *Chessman* attitude of "fact, not distance" also became a factor in the implementation of the simple kidnaping statute (section 207). See, e.g., *People v. Rich*, 177 Cal. App. 2d 617, 2 Cal. Rptr. 600 (1960). Although *Chessman* involved section 209, the court in *Rich* applied the *Chessman* rationale to a conviction of simple kidnaping in its statement that "distance, route taken, or area covered" are immaterial considerations. *Id.* at 621, 2 Cal. Rptr. at 602.

104. 50 Cal. 2d at 411-12, 326 P.2d at 473. The defendant in *Wein* had been charged and found guilty of three counts of robbery (section 211), six counts of rape (section 261 (3)), six counts of sex perversion (section 288a), two counts of simple kidnaping (section 207), and five counts of kidnaping for robbery (section 209). The jury found that in each act of kidnaping for robbery the victim suffered bodily injury. The penalty for each count of kidnaping for robbery had been fixed at death. *Id.* at 391, 326 P.2d at 461.

105. *Id.* at 400, 326 P.2d at 466.

106. The dissenting opinion in *Wein* described one incident that had been held to be kidnaping for robbery and for which the death penalty had been fixed. Wein seized the victim in her bedroom and demanded her money, but he did not take the one dollar he found in her wallet. He then "helped [her] up on the bed" where he raped her. Thus, the defendant's subsequent conviction on this count of kidnaping for robbery was based on a movement which consisted only of the distance between the floor and the bed: four or five feet. See *id.* at 412, 326 P.2d at 474 (Carter, J., dissenting).

107. Prior to *Wein*, none of the section 207 convictions which had been reviewed

The court's broad interpretation of "kidnaps . . . to commit robbery" was severely criticized. Commentators urged the court to exclude the trivial or incidental movement of a robbery victim from the scope of aggravated kidnapping. They argued that basing a kidnapping for robbery conviction on such insignificant movements emasculated the purpose of the 1951 amendment.<sup>108</sup> The supreme court, however, continued to uphold its broad interpretation of kidnapping for robbery for almost eighteen years.

### Reinterpretation of "Kidnaps . . . To Commit Robbery" and Development of a Two-Prong Test

The broad interpretation of "kidnaps . . . to commit robbery" formulated by the court in *Chessman* and *Wein* was rejected in the 1969 case of *People v. Daniels*.<sup>109</sup> In *Daniels*, the court redefined the term "kidnaping" in section 209 and adopted the selective application approach to the offense of kidnapping for robbery. In subsequent cases, the court has cited the opinion in *Daniels* as authority in the development of the current two-pronged test for kidnapping for robbery.<sup>110</sup>

#### People v. Daniels: Aligning the Judicial Interpretation of "Kidnaps . . . To Commit Robbery"

The kidnapping for robbery convictions in *People v. Daniels* arose from the robbery and rape of three women in their own homes. In each case, the defendants forced their way into the residence, and each victim was moved at gunpoint to get her purse or to see if anyone was in another room. Each movement was within the same room or from one room to another. The distances of the movements were thirty feet, eighteen feet, and six feet. A jury found the defendants guilty on all counts, and the penalty for the kidnapping for the robbery convictions was fixed at death.<sup>111</sup>

Although the court reversed the defendants' convictions under section 209, it admitted that "[u]nder the rule of *Chessman* and *Wein*, such brief movements of the victims would constitute 'kidnaping and carrying away' within the meaning of the statute and would therefore be

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had involved asportations entirely within one enclosure. See *id.* at 416, 326 P.2d at 477 (Carter, J., dissenting).

108. See generally Note, *Kidnaping and the Element of Asportation*, 35 S. CAL. L. REV. 212 (1962); Comment, *Room-to-Room Movement: A Risk Rationale For Aggravated Kidnaping*, 11 STAN. L. REV. 554 (1959); 10 HASTINGS L.J. 323 (1959).

109. 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969).

110. See text accompanying notes 129-65 *infra*.

111. Between them, the two defendants were charged with five counts of kidnapping for robbery and one count of rape. The jury found the kidnapping for robbery victims had suffered bodily injury. 71 Cal. 2d at 1122, 459 P.2d at 226, 80 Cal. Rptr. at 898.

sufficient to support defendants' convictions of violating section 209."<sup>112</sup> The court, however, termed *Chessman* and *Wein* "obstructions to the flow" of common sense in the construction and application of kidnapping statutes.<sup>113</sup> The unanimous court in *Daniels* felt that the teaching of time and experience dictated a reconsideration of the legislative intent behind the 1951 amendment to section 209.<sup>114</sup>

In its reinterpretation of "kidnaps . . . to commit robbery," the court in *Daniels* initially considered the meaning of kidnapping within the context of section 209. The court in *Daniels* reasoned that the word "kidnaps" in section 209 refers to the definition of simple kidnapping in section 207.<sup>115</sup> The court recognized that some brief movements are necessarily incidental to the crime of armed robbery<sup>116</sup> and concluded that such incidental movements were not intended by the legislature to fall within the scope of kidnapping for robbery because they did not constitute kidnapping under section 207.<sup>117</sup> Support for this holding was found in the court's earlier decision of *Cotton v. Superior Court*.<sup>118</sup> In *Cotton*, alleged violations of simple kidnapping under section 207 stemmed from assaults by union organizers upon farm workers during a riot at a farm labor camp.<sup>119</sup> Upon ordering that the kidnapping counts be dismissed, the court in *Cotton* held that a technical asportation did not constitute simple kidnapping when the movement was *merely incidental* to an underlying assault, since "the Legislature could not reasonably have intended that such incidental movement be a taking ' . . . from one part of the country to another.' "<sup>120</sup> Thus, under the reasoning and language of *Cotton*, any movement incidental to a robbery does not constitute a kidnapping and consequently falls outside the scope of section 209.<sup>121</sup>

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112. *Id.* at 1126, 459 P.2d at 229, 80 Cal. Rptr. at 901.

113. *Id.* at 1127, 459 P.2d at 229, 80 Cal. Rptr. at 901.

114. *Id.* at 1127-28, 459 P.2d at 229-30, 80 Cal. Rptr. at 901-02.

115. *Id.* at 1131, 459 P.2d at 232, 80 Cal. Rptr. at 904, *quoting* *People v. Wein*, 50 Cal. 2d 383, 415, 326 P.2d 457, 476 (1958) (Carter, J., dissenting).

116. 71 Cal. 2d at 1134, 459 P.2d at 234, 80 Cal. Rptr. at 906.

117. *Id.*

118. 56 Cal. 2d 459, 364 P.2d 241, 15 Cal. Rptr. 65 (1961).

119. After failing to persuade the braceros to come out of the camp voluntarily, the union strikers forced their way in and resorted to violence. Convictions under section 207 were based on the forced movements of three farm workers. One bracero was chased into the barracks, then ordered out by strikers armed with sticks, stones, and knives. A second bracero was shoved by strikers toward the camp's front gate. The third was pulled from a toilet, struck on the head, and dragged some fifteen feet before being thrown to the ground. *Id.* at 463-64, 364 P.2d at 243-44, 15 Cal. Rptr. at 67-68.

120. *Id.* at 465, 364 P.2d at 244, 15 Cal. Rptr. at 68.

121. The court in *Daniels* found in a landmark opinion by the New York Court of Appeals additional persuasive authority for holding that movements incidental to other crimes do not constitute kidnapping. *See* 71 Cal. 2d at 1135, 459 P.2d at 235, 80 Cal.

The treatment of kidnaping in *Daniels* indicated a further legislative limit on the scope of section 209. The 1951 amendment was a clear indication that the legislature did not want the aggravated kidnaping statute to apply to standstill robberies.<sup>122</sup> In *Daniels*, the court announced that the legislature also intended that section 209 not apply to robberies involving movement which was merely incidental to the robbery.<sup>123</sup> Moreover, the court announced an additional limitation on the scope of the statute by adopting a selective application approach to kidnaping for robbery. According to the court, the legislature did not intend section 209 to apply to a robbery if the asportation did not "substantially increase" the risk of harm over the risks inherent in robbery.<sup>124</sup>

This new interpretation of "kidnaps . . . to commit robbery" was then applied to the facts of *Daniels*. The court found that the brief movements which the defendants compelled their robbery victims to perform were "merely incidental to [the robbery] and did not substantially increase the risk of harm otherwise present."<sup>125</sup> Consequently, the defendants' convictions of kidnaping for robbery were reversed.<sup>126</sup>

*People v. Daniels* is a landmark decision in the law of kidnaping because it abrogated the eighteen year-old *Chessman* interpretation of section 209—a construction which predicated application of the kidnaping for robbery portion of the statute on the mere fact of forcible removal in connection with a robbery.<sup>127</sup> By rejecting the *Chessman* interpretation, the court in *Daniels* effected a significant change in the definition of this offense. Summarizing this new definition, the opinion concluded:

[W]e hold that the intent of the Legislature in amending Penal Code section 209 in 1951 was to exclude from its reach not only "standstill" robberies . . . but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself.<sup>128</sup>

### Development of a Two-Prong Test

The court in *Daniels* limited its discussion to movements during a robbery which would *not* constitute kidnaping for robbery.<sup>129</sup> Because

Rptr. at 907 (1969), quoting *People v. Levy*, 15 N.Y.2d 159, 164, 204 N.E.2d 842, 844, 256 N.Y.S.2d 793, 796 (1965).

122. See text accompanying notes 77-87 *supra*.

123. 71 Cal. 2d at 1139, 459 P.2d at 238, 80 Cal. Rptr. at 910.

124. *Id.*

125. *Id.* at 1140, 459 P.2d at 238, 80 Cal. Rptr. at 910.

126. *Id.*

127. See *id.* at 1139, 459 P.2d at 238, 80 Cal. Rptr. at 910.

128. *Id.* (citations omitted).

129. See *id.*

the facts of *Daniels* fell within these categories, the court was not required to describe the facts which *would* constitute kidnaping for robbery.<sup>130</sup> In the exclusionary terms of *Daniels*, there can be *no* conviction of kidnaping for robbery if: (1) the movements are merely incidental to the robbery; *or* (2) the movements do not substantially increase the risk of harm.<sup>131</sup>

In a line of cases following *Daniels*, the supreme court has inverted the exclusionary language of *Daniels* and developed a two-prong test which is stated in affirmative terms.<sup>132</sup> Under this formula, the movement of a victim during a robbery constitutes kidnaping for robbery when the following two-prong test is met:

- (1) *Movement Test*: the movement must be more than merely incidental to the robbery (in other words, there must be a kidnaping); *and*
- (2) *Increased Risk Test*: the movement must substantially increase the victim's risk of harm over the risk inherent in robbery.

The next two sections of this note separately analyze the court's application of each prong of this test.

### The Movement Test

The supreme court experienced no difficulty in applying the movement test to cases which immediately followed *Daniels*. Quite often the court was able to hold, without elaboration, that the movements of the victim in connection with the robbery were merely "incidental movements."<sup>133</sup> Consequently, the kidnaping for robbery convictions were

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130. See *id.* at 1140 n.14, 459 P.2d at 238, 80 Cal. Rptr. at 910.

131. See *id.* Some authorities have indicated that if the movement is more than incidental to the robbery, kidnaping for robbery will apply irrespective of whether the movement increased the risk of harm. See, e.g., *In re Bryant*, 19 Cal. App. 3d 933, 937-39, 97 Cal. Rptr. 40, 42-44 (1971) (concurring opinion); *People v. Stathos*, 17 Cal. App. 3d 33, 38-39, 94 Cal. Rptr. 482, 484-85 (1971); *The Supreme Court of California 1969-1970*, 59 CALIF. L. REV. 30, 189 (1971). The supreme court has rejected this assertion outright. See *In re Earley*, 14 Cal. 3d 122, 127-28, 534 P.2d 721, 724-25, 120 Cal. Rptr. 881, 884-85 (1975).

132. See, e.g., *In re Earley*, 14 Cal. 3d 122, 127, 534 P.2d 721, 724-25, 120 Cal. Rptr. 881, 884-85 (1975). The logic of stating this two-prong test in affirmative terms is questionable. The court in *Daniels* indicated that kidnaping for robbery is not committed in the absence of two specific elements. The court in *Daniels* did not state that those two elements are all that is necessary to constitute the offense. See text accompanying notes 167-69 *infra*.

133. See, e.g., *People v. Adams*, 4 Cal. 3d 429, 482 P.2d 657, 93 Cal. Rptr. 745 (1971) (moving liquor store employee to rear storage area was merely incidental to robbery); *People v. Ungrad*, 4 Cal. 3d 420, 482 P.2d 653, 93 Cal. Rptr. 741 (1971) (moving victims to various rooms to look for valuables during robbery was merely

reversed, usually by a unanimous court.<sup>134</sup> Not until 1974 did a sharp disagreement arise on the bench as to which movements are incidental within the meaning of the movement test.

In 1974 the supreme court heard the case of *People v. Thornton*.<sup>135</sup> In *Thornton* the defendant had been found guilty on two counts of kidnaping for robbery. These two convictions were based on the following facts. As an eighteen year-old girl entered her car, the defendant forced his way into the vehicle, commandeered it, and drove away while holding the victim's head with his right arm. He drove four blocks before parking the car and committing robbery and rape. The second count of kidnaping for robbery was based on slighter movement. The defendant approached a woman outside a tavern, forcing her at gunpoint to walk down the street for approximately one block. There, behind a deserted service station, he forced her into a parked car, took money from her purse, and sexually assaulted her.

In affirming the two convictions of kidnaping for robbery, the majority in *Thornton* stated:

It is clear that the asportation of the victim in each of these cases was not "merely incidental to the commission of the robbery". . . . The fact that in each case defendant chose to consummate the robbery at a location *remote* from the place of initial contact does not render the subsequent asportation "merely incidental" to the crime, for it is the very fact that defendant utilized *substantial asportation* in the commission of the crime which renders him liable to the increased penalty of section 209 if that asportation was such that the victim's risk of harm was substantially increased thereby.<sup>136</sup>

Significantly, the majority in *Thornton* found the movements to have been more than incidental without reference to feet and inches. Rather, the court used such terms as "substantial asportation" and described the asportation as having been to a "remote" location. Without further discussion, the majority went on to hold, as a matter of law, that the asportation of each victim had not been merely incidental to the crime of robbery, therefore satisfying the movement element of the two-prong test.<sup>137</sup>

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incidental to robbery); *People v. Adame*, 4 Cal. 3d 417, 482 P.2d 652, 93 Cal. Rptr. 740 (1971) (moving two market employees from check stand to office was merely incidental to robbery).

134. The majority of these cases arose as a result of the court's ruling that the interpretation of section 209 expressed in *Daniels* applied retroactively. This ruling entitled a defendant whose conviction of kidnaping for robbery became final before the *Daniels* decision to post-conviction relief upon a showing that his conduct was not prohibited by section 209 as construed in *Daniels*. See *People v. Mutch*, 4 Cal. 3d 389, 395-97, 482 P.2d 633, 636-38, 93 Cal. Rptr. 721, 724-26 (1971).

135. 11 Cal. 3d 738, 523 P.2d 267, 114 Cal. Rptr. 467 (1974).

136. *Id.* at 768, 523 P.2d at 287, 114 Cal. Rptr. at 487 (emphasis added).

137. *Id.* at 769 n.20, 523 P.2d at 288, 114 Cal. Rptr. at 488.

Justice Mosk, in his dissenting and concurring opinion in *Thornton*, disagreed with the majority's view of these movements. Justice Mosk apparently examined asportation strictly in terms of the actual distance traveled and found it insufficient.<sup>138</sup> He retraced the movements of each section 209 incident and found that the total distance covered had been four blocks in the first incident and only one block in the second incident. Viewing the movements only in terms of distance traveled, Justice Mosk objected to the majority's reference to movements of one and four blocks as remote. He reasoned that the displacement of each victim had been no more than a brief movement to facilitate the robbery and hence had been incidental within the meaning of *Daniels*.<sup>139</sup> Justice Mosk also criticized the majority for holding "as a matter of law" that a movement of only one city block constitutes kidnaping. Reasoning that this holding created a blatantly arbitrary measurement, he feared it would serve as a standard for cases to follow.<sup>140</sup>

Justice Mosk's fears were realized in the recent decision in *In re Earley*.<sup>141</sup> In *Earley*, convictions of kidnaping for robbery, under section 209, and robbery, under section 211, were based on the following facts. The defendant approached the victim's car, which was stopped at an intersection. Holding a gun-shaped cigarette lighter, the defendant commandeered the vehicle and drove ten blocks before taking the victim's watch and eight dollars and fleeing on foot.

In *Earley*, the court announced that the movement of a victim for a *substantial distance* to facilitate a robbery would satisfy the movement test. The court used the following three-step reasoning process to justify this conclusion: (1) "Brief movements to facilitate either robbery or robbery and rape are incidental thereto within the meaning of *Daniels*";<sup>142</sup> (2) "[o]n the other hand movements to facilitate the foregoing crime or crimes [robbery or robbery and rape] that are for a substantial distance rather than brief are not incidental thereto within the meaning of *Daniels*";<sup>143</sup> (3) therefore, "[m]ovements for a substantial distance within one county manifestly constitute a carrying from one part of the county to another."<sup>144</sup>

In affirming the conviction under section 209, the majority in *Earley* found the ten-block movement involved in that case to have been

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138. See *id.* at 775-77, 523 P.2d at 292-93, 114 Cal. Rptr. at 492-93.

139. *Id.* at 776, 523 P.2d at 293, 114 Cal. Rptr. at 493.

140. *Id.* at 777, 523 P.2d at 293, 114 Cal. Rptr. at 493.

141. 14 Cal. 3d 122, 534 P.2d 721, 120 Cal. Rptr. 881 (1975).

142. *Id.* at 129, 534 P.2d at 726, 120 Cal. Rptr. at 886 (citations omitted).

143. *Id.* at 130, 534 P.2d at 726, 120 Cal. Rptr. at 886 (citations omitted).

144. *Id.*, citing CAL. PEN. CODE § 207 (West 1970).



a substantial asportation which satisfied the movement test.<sup>145</sup> The court did not, however, look to the facts and circumstances of the case to determine whether the asportation had been substantial. Instead, the majority in *Earley* merely relied on previous cases in which a shorter distance had been termed "more than incidental." Citing the opinion in *Thornton*, the majority in *Earley* held:

[M]ovement in the instant case was 10 to 13 blocks. Movement of that distance or less has been expressly or impliedly viewed as substantial rather than brief in cases involving section 209 and section 207. Since the movement here was substantial, it was not "merely incidental to the commission of the robbery" . . . .<sup>146</sup>

Under the reasoning in *Earley*, the movement test will be satisfied upon a finding of substantial asportation. The method which the court in *Earley* used to determine whether there had been substantial asportation indicates that the court will not examine the circumstances of the particular case, nor will the asportation be viewed in relation to the robbery. Rather, the court will merely measure the distance and then look to earlier decisions to see whether that distance has been held to be a "substantial asportation."

Since the court in *Thornton* found one block to be a substantial asportation, one block is apparently the threshold distance which constitutes kidnaping.<sup>147</sup> Therefore, regardless of the circumstances, any movement of a victim, during a robbery, of one block or more is a substantial asportation and satisfies the movement element of the two-prong test for determining kidnaping for robbery.

### The Increased Risk Test

The court in *Daniels* reasoned that the legislature intended to preclude application of the kidnaping for robbery provision when the movement involved in the robbery did not substantially increase the victim's risk of injury.<sup>148</sup> On the basis of this interpretation, the court uses the increased risk test in conjunction with the movement test to determine whether a defendant's acts constitute kidnaping for robbery.

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145. See *id.* at 130-31, 534 P.2d at 726-27, 120 Cal. Rptr. at 886-87.

146. *Id.* at 130, 534 P.2d at 726-27, 120 Cal. Rptr. at 886-87 (citations omitted).

147. Implementation of this one-block standard has even been used to overrule prior cases in which an asportation of more than one block had been held to be merely incidental. The court in *Earley*, implementing this one-block reasoning, stated that *Thornton* had impliedly overruled *People v. Timmons*, 4 Cal. 3d 411, 482 P.2d 648, 93 Cal. Rptr. 736 (1971), in which the court had held a five-block asportation to be merely incidental to the robbery. See 14 Cal. 3d at 130-31, 132 n.14, 534 P.2d at 726-27, 728, 120 Cal. Rptr. at 886-87, 888.

148. *People v. Daniels*, 71 Cal. 2d 1119, 1139, 459 P.2d 225, 238, 80 Cal. Rptr. 897, 910 (1969).

The supreme court initially discussed the nature of the increased risk test in the opinion in *People v. Timmons*.<sup>149</sup> In *Timmons*, the defendant approached the car of two market employees who were returning from the bank with \$15,600 in their possession. The defendant hijacked the car, which was then driven according to his directions while the passenger-employee surrendered the sacks of money to the defendant. After a five-block drive, the defendant directed the driver to pull the car over to the curb, where he exited with the money. The court in *Timmons* issued an order to vacate the judgments on the kidnaping for robbery counts because the movements had not substantially increased the risk.<sup>150</sup>

Writing for the majority in *Timmons*, Justice Mosk clarified his original reference in *Daniels* to movements which "substantially increase the risk of harm." Stating that this language did not refer to an increase in the likelihood the robbery would occur, Justice Mosk explained: "Rather, we intended to refer to an increase in the risk that the victim may suffer significant physical injuries over and above those to which a victim of the underlying crime is normally exposed."<sup>151</sup>

In *Timmons*, Justice Mosk also emphasized that not every kidnaping committed during a robbery constitutes kidnaping for robbery. He explained that an act of kidnaping may create some slight increase in the risk of injury to the victim.<sup>152</sup> Such a kidnaping, Justice Mosk stated, would not constitute kidnaping for robbery, since it would not *substantially* increase the risk.<sup>153</sup>

Justice Sullivan's concurring and dissenting opinion in a companion case, *People v. Mutch*,<sup>154</sup> is of particular significance to a discussion of the increased risk test.<sup>155</sup> In that opinion, Justice Sullivan urged the majority to view asportation in light of the totality of the circumstances. Contending that the destination toward which the movement is directed should be considered, Justice Sullivan states:

It is conceivable that movement with or without assaultive acts to a *remote* place may substantially increase the risk of harm over that necessarily present in the underlying crime, by reducing or even removing the probability of the victim's appeals for help or by exposing him to abusive conduct not otherwise feasible.<sup>156</sup>

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149. 4 Cal. 3d 411, 482 P.2d 648, 93 Cal. Rptr. 736 (1971).

150. See *id.* at 414-16, 482 P.2d at 650-51, 93 Cal. Rptr. at 738-39.

151. *Id.* at 414, 482 P.2d at 650, 93 Cal. Rptr. at 738.

152. See *id.* at 415-16, 482 P.2d at 651, 93 Cal. Rptr. at 739.

153. *Id.*

154. 4 Cal. 3d 389, 482 P.2d 633, 93 Cal. Rptr. 721 (1971).

155. In *Mutch*, the court held that the conduct of an armed robber who had forced victims to crawl into adjacent rooms did not constitute kidnaping for robbery. See *id.* at 397, 482 P.2d at 638, 93 Cal. Rptr. at 726.

156. *Id.* at 400, 482 P.2d at 640, 93 Cal. Rptr. at 728 (concurring & dissenting opinion).

In *In re Crumpton*,<sup>157</sup> a habeas corpus proceeding, the court rejected Justice Sullivan's suggestion that the increased risk test could be satisfied solely by removing the victim from public view. The kidnaping for robbery conviction in *Crumpton* had been based on a service station robbery in which the defendant had forced the attendant to walk approximately thirty feet and lie down behind a truck. The attorney general argued that the movement had aggravated the risk by diminishing the likelihood of public observation of the infliction of physical harm on the attendant. The court, however, rejected this contention, stating that "acts of removing the victim from public view do not *in themselves* substantially increase the risk of harm within our rule in *Daniels*."<sup>158</sup> Thus, the court in *Crumpton* ruled that removal of the victim from public view is a factor, but is not determinative, in considering whether the movement substantially increased the victim's risk of harm.

The manner of forcible control exerted over the victim during the asportation, however, may be sufficient to satisfy the increased risk test.<sup>159</sup> In *Thornton*, the manner of forcible control was held, as a matter of law, to have substantially increased the risk of harm over that inherent in robbery.<sup>160</sup> The record in *Thornton* indicates the forcible control which was used during the asportation: one victim was held around the neck by the defendant's right arm as he drove with his left arm. The other victim was forcibly controlled by being made to walk at gunpoint in front of the defendant. Without describing the particular risks created by the forcible control, the court in *Thornton* ruled:

[A]ny substantial asportation which involves forcible control of the robbery victim such as that occurring in this case exposes her to grave risks of harm to which she would not have been subject had the robbery occurred at the point of initial contact.<sup>161</sup>

The above cases serve as a foundation for the court's increased risk test. To satisfy this test, there must be a risk beyond the risk of robbery that the victim will suffer bodily injury.<sup>162</sup> While a kidnaping may well create some risks, the act does not meet the increased risk test unless the kidnaping increases the risks *substantially*.<sup>163</sup> Such risks may be created by the manner of forcible control during the asportation.<sup>164</sup> The dangers which arise solely from the removal of the victim from public view, however, are not considered significant enough to satisfy the

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157. 9 Cal. 3d 463, 507 P.2d 74, 106 Cal. Rptr. 770 (1973).

158. *Id.* at 467, 507 P.2d at 76, 106 Cal. Rptr. at 772 (emphasis added).

159. See, e.g., *People v. Lara*, 12 Cal. 3d 903, 528 P.2d 365, 117 Cal. Rptr. 549 (1974).

160. See notes 135-38 & accompanying text *supra*.

161. 11 Cal. 3d at 768, 523 P.2d at 287, 114 Cal. Rptr. at 487.

162. See text accompanying note 151 *supra*.

163. See text accompanying note 153 *supra*.

164. See text accompanying notes 159-61 *supra*.

test.<sup>165</sup> If the asportation is found to be a kidnaping under the movement test, and if that kidnaping satisfies the increased risk test, the act is deemed to constitute kidnaping for robbery.

### A Proposed Alternative Test for Kidnaping for Robbery

Two landmarks in the twenty-five year history of kidnaping for robbery since the 1951 amendment to section 209 are the opinion in *Daniels* and the subsequently developed two-prong test. While the court still claims allegiance to *Daniels*, and all kidnaping for robbery cases cite *Daniels* as controlling authority, the two-prong test ignores some of the views clearly enunciated in *Daniels*.<sup>166</sup> This note proposes an alternative method to determine kidnaping for robbery. The objective of this proposed alternative approach is to align the definition of kidnaping for robbery with the attitudes embraced by *Daniels*, while eliminating the maladies which exist under the two-prong test.

#### Inconsistencies Between *Daniels* and the Two-Prong Test

The two-prong test is not a precise, logical descendant of *Daniels*. The court in *Daniels* held that two types of movement (incidental movements and movements which did not substantially increase the risk of harm) would *not*, in conjunction with a robbery, constitute kidnaping for robbery.<sup>167</sup> Apparently grounded on the opinion in *Daniels*, the current two-prong test directs that an asportation during a robbery is kidnaping for robbery if the movement does not fall into these two categories.<sup>168</sup> *Daniels* does not, however, state what type of movement will violate section 209.<sup>169</sup> The court in *Daniels* may have envisioned additional requirements before the movement would constitute an aggravated kidnaping.

Nevertheless, the opinion in *Daniels* does not prohibit the bifurcated approach of first determining whether the movement constitutes kidnaping and then determining whether the kidnaping has substantially increased the risk of harm. Thus, the *theory* of the two-prong test is not misplaced; however, certain factors which comprise the two-prong test

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165. See text accompanying notes 157-58 *supra*.

166. Dissenting in both *Earley* and *Thornton*, Justice Mosk stated that the majority misapplied the treatment of kidnaping for robbery envisioned by the court in *Daniels*. See *In re Earley*, 14 Cal. 3d 122, 133-41, 534 P.2d 721, 729-34, 120 Cal. Rptr. 881, 889-94 (1975) (dissenting opinion); *People v. Thornton*, 11 Cal. 3d 738, 770-83, 523 P.2d 267, 288-98, 114 Cal. Rptr. 467, 488-98 (1974) (concurring & dissenting opinion).

167. See text accompanying note 128 *supra*.

168. See text accompanying note 132 *supra*.

169. See text accompanying notes 129-30 *supra*.

are directly contrary to views expressed in *Daniels*. These factors are found in both the movement test and the increased risk test.

The movement element of the two-prong test has defined kidnaping as being a movement of one block or more.<sup>170</sup> Such a definition is diametrically opposed to the theories articulated in *Daniels*. The court in *Daniels* emphasized that kidnaping should not be defined by an established distance standard.<sup>171</sup> The *Daniels* decision spoke of the importance of defining kidnaping in *flexible* terms.<sup>172</sup>

The movement element also conflicts with the *Daniels* mandate of a case by case determination of kidnaping. Under the two-prong test, kidnaping is determined by arbitrarily measuring the asportation, without regard to the relation between the movement and the robbery. The language in *Daniels*, however, indicates that determinations concerning kidnaping for robbery should involve examination of the totality of the circumstances in each act of robbery. The consideration envisioned in *Daniels* was a determination of whether the movement was "merely incidental to" the act of robbery.<sup>173</sup> The opinion in *Daniels* reasoned that this determination is made by examining whether the asportation played a "significant role" in the robbery.<sup>174</sup> The court in *Daniels* also referred to examining the "criminological significance" of the asportation to determine kidnaping.<sup>175</sup> Thus, the act of robbery peculiar to each case must be considered in order to determine whether the asportation played a significant role in the crime. Moreover, all the particular circumstances must be considered to determine whether the asportation had any criminological significance. The two-prong test's application of an arbitrary one-block rule does not provide for this type of flexible determination.

The current increased risk element of the two-prong test also departs from the *Daniels* notion of kidnaping for robbery. The two-prong test continues to follow the holding of *Crumpton* that a removal of the victim from public view will *not*, by itself, satisfy the increased risk test.<sup>176</sup> This doctrine should be rejected, since the removal from public view might substantially increase the victim's risk of injury over the risks inherent in robbery.<sup>177</sup> Certainly, a degree of physical abuse is

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170. See text accompanying notes 135-47 *supra*.

171. See 71 Cal. 2d at 1128, 459 P.2d at 230, 80 Cal. Rptr. at 902.

172. See *id.* at 1128-29, 459 P.2d at 230, 80 Cal. Rptr. at 902.

173. See *id.* at 1134, 459 P.2d at 234, 80 Cal. Rptr. at 906.

174. See *id.* at 1137, 459 P.2d at 236, 80 Cal. Rptr. at 908.

175. See *id.* at 1138, 459 P.2d at 237, 80 Cal. Rptr. at 909.

176. See text accompanying notes 157-58 *supra*.

177. The court in *Crumpton* failed to give recognition to the many appellate decisions which had found that the removal of a victim from public view had substantially increased the risk of injury. See, e.g., *In re Lokey*, 41 Cal. App. 3d 767, 116 Cal. Rptr. 299 (1974) (defendants took a husband and wife from "a place of safety" to a

common to robbery.<sup>178</sup> Nevertheless, if a robbery victim is removed from public view, he is subject to a higher degree of physical abuse than might otherwise be feasible.<sup>179</sup> Removal from society provides time and seclusion for an extended assault; the robber is allowed to prolong the confrontation and vent his aggressions upon the victim free from observation.<sup>180</sup> Removal from society also increases the victim's risk of being cut off from medical aid.<sup>181</sup> These dangers are drastically reduced if the robbery is performed in public view. Without isolation, the robber must effectuate the robbery as quickly as possible to avoid detection. Complicating the robbery with an extended physical assault would increase the possibility of apprehension or intervention by third parties.<sup>182</sup> Thus, since the removal of a victim from public view might create dangers substantially greater than the dangers inherent in robbery, such an act could satisfy the requirement of *Daniels*. Yet the increased risk test fails to give full weight to such hazards. Consequently, the two-prong test undercuts crucial dangers of kidnaping which might constitute kidnaping for robbery according to *Daniels*.

By defining kidnaping in terms of a specific distance, by applying that standard arbitrarily, and by failing to recognize fully the dangers of removal from society, the two-prong test deviates drastically from the views expressed in *Daniels*. This note proposes that the judiciary abandon the two-prong test and determine kidnaping for robbery according to the approach suggested in *Daniels*.

### The Daniels Approach to Kidnaping for Robbery

The court in *Daniels* did not attempt to change any statute. The decision simply reflected a revised interpretation of the legislative in-

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remote spot in the country where the wife was raped and the husband was murdered); *People v. Curtis*, 21 Cal. App. 3d 704, 98 Cal. Rptr. 775 (1971) (victims were taken from a well-lighted intersection for five blocks to a deserted place under freeway construction where one victim was robbed); *People v. Hill*, 20 Cal. App. 3d 1049, 98 Cal. Rptr. 214 (1971) (victim was threatened with a hatchet while in public view in a parking lot and shot by the defendant when removed from public observation inside a store); *People v. Miller*, 12 Cal. App. 3d 922, 91 Cal. Rptr. 97 (1970) (defendants picked up young women on a busy street corner, drove to a distant quiet residential area, and robbed and raped them).

178. "Pistol-whipping, unfortunately, is a risk inherent in the crime of armed robbery . . ." *People v. Mutch*, 4 Cal. 3d 389, 398, 482 P.2d 633, 638, 93 Cal. Rptr. 721, 726 (1971).

179. The fact that the dangers did not materialize does not mean that the risk of harm was not substantially increased by the asportation. See *People v. Milan*, 9 Cal. 3d 185, 193, 507 P.2d 956, 961, 107 Cal. Rptr. 68, 73 (1973).

180. See *In re Lokey*, 41 Cal. App. 3d 767, 772, 116 Cal. Rptr. 299, 302 (1974).

181. See *People v. Mays*, 17 Cal. App. 3d 641, 644, 95 Cal. Rptr. 190, 192 (1971).

182. See *People v. Ellis*, 15 Cal. App. 3d 66, 73, 92 Cal. Rptr. 907, 912 (1971).

tent.<sup>183</sup> As discussed earlier, the phrase "kidnaps . . . to commit robbery" is susceptible to several interpretations.<sup>184</sup> The court in *Daniels* decided that the interpretation which the legislature intended used the term "kidnaps" according to the definition of simple kidnaping in section 207.<sup>185</sup> The court in *Daniels* also determined that the legislature contemplated a selective application of the sanctions of section 209, intending that the penalties provided in the statute be imposed only when a kidnaping in conjunction with intent to commit robbery created dangers in addition to those inherent in robbery.<sup>186</sup> *Daniels* is apparently an accurate reflection of the intent of the legislature, since the legislature adopted the language of *Daniels* in its recent enactment restoring the death penalty in California.<sup>187</sup>

The court in *Daniels* did not enunciate a formula for determining whether an asportation during a robbery constitutes kidnaping for robbery. The language in the unanimous *Daniels* opinion, however, suggests that the court approached the problem by examining the risks of harm created by the movement to determine whether the asportation was "merely incidental to the robbery," and also to determine whether the movement substantially increased the risk of injury.

Under the reasoning in *Cotton*, the court in *Daniels* held that movements merely incidental to the robbery do not constitute the kidnaping element of section 209.<sup>188</sup> As noted in *People v. Ellis*,<sup>189</sup> "a reading of *Daniels*, and the authorit[ies] there relied upon, [show] that the term 'incidental' was used in the sense that the asportation play[ed] no significant or substantial part in the planned robbery . . . ."<sup>190</sup> Whether the asportation is significant or plays a substantial role can be determined by looking at the risks it creates. If the asportation does not create any dangers in addition to those inherent in an act of robbery, the movement is merely incidental because it is not significant or a substantial part of the robbery.<sup>191</sup> If, on the other hand, the asportation creates additional risks of harm, the movement is significant and plays a substantial part in the crime. Thus, if the asportation of a victim creates additional risks of harm, that asportation constitutes kidnaping according to the reasoning of *Daniels*.

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183. See 71 Cal. 2d at 1127-28, 459 P.2d at 229-30, 80 Cal. Rptr. at 901-02.

184. See text accompanying notes 87-93 *supra*.

185. See text accompanying note 115 *supra*.

186. See text accompanying note 124 *supra*.

187. See Cal. Stat. 1973, ch. 719, § 5(b)(3)(ii), at 1299.

188. See text accompanying note 117 *supra*.

189. 15 Cal. App. 3d 66, 92 Cal. Rptr. 907 (1971).

190. *Id.* at 70, 92 Cal. Rptr. at 910.

191. See *People v. Daniels*, 71 Cal. 2d 1119, 1137-38, 459 P.2d 225, 236-37, 80 Cal. Rptr. 897, 908-09 (1969).

The court in *Daniels* indicated that an examination of the risks created by the asportation should continue if the movement is found to be a kidnaping. The court held that even if the movement is more than incidental, the sanctions of kidnaping for robbery will not apply if the kidnaping does not "substantially increase the risk of harm."<sup>192</sup> The act of kidnaping may create certain dangers which justify punishment but which may increase the risk only slightly.<sup>193</sup> Thus, there must be an examination as to the *degree* of risk created by the asportation to see whether the victim's risk of injury was *substantially* increased thereby.

#### **Proposed Alternative Method To Determine Kidnaping for Robbery: Examining the Risk of Harm**

The California judiciary should determine what constitutes kidnaping for robbery by the method indicated in *Daniels*. Examining the risk of harm would reveal whether the movement was more than incidental to the robbery and whether the danger was substantially increased. Thus, the risk of harm examination would determine both the threshold question of whether there was a kidnaping and the ultimate question of whether the offense constitutes kidnaping for robbery. The suggested inquiry would entail a measurement of the risk of injury to the victim. If the movement increased the risk already inherent in robbery, the act of asportation would be punishable. The degree of punishment would depend upon the degree to which the asportation increased the victim's risk of injury.

The fact that a person was moved during the commission of a robbery would trigger this risk of harm examination. The inquiry would result in one of three findings:

(1) The movement may not have created any risk of harm to the victim in addition to those already present in the robbery. In such a case, the movement was merely incidental to the robbery and does not constitute kidnaping; nor does the movement deserve independent punishment.<sup>194</sup>

(2) The movement may have created a slight increase in the victim's risk of injury. Such a determination would be reasonable when the circumstances of the asportation created a remote possibility of injury. In such a case, the movement was more than incidental because it created additional risks.<sup>195</sup> Thus the movement constitutes kidnap-

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192. See text accompanying note 124 *supra*.

193. See *People v. Timmons*, 4 Cal. 3d 411, 415-16, 482 P.2d 648, 651, 93 Cal. Rptr. 736, 739 (1971).

194. See *People v. Daniels*, 71 Cal. 2d 1119, 1134-39, 459 P.2d 225, 234-38, 80 Cal. Rptr. 897, 906-10 (1969).

195. See *id.*



ing.<sup>196</sup> Since the kidnaping did not substantially increase the risk of injury, however, the act of compelled movement does not constitute kidnaping for robbery under section 209.<sup>197</sup> Nonetheless, the asportation would fall within the definition of kidnaping in section 207. Thus, the assailant could be punished for his act of robbery under section 211 and for simple kidnaping under section 207.

(3) The movement may have substantially increased the risk of injury beyond the risk inherent in robbery. Such a result may have occurred because many different dangers were created by the circumstances of the asportation or because the asportation created a particular danger which was likely to occur. These conditions characterize the movement as kidnaping for robbery. The legislature apparently feels that if the movement created substantial dangers over the risks caused by the robbery, the asportation constitutes an aggravated kidnaping rather than a simple kidnaping. The assailant in this situation would be found to have violated both sections 211, which proscribes robbery, and section 209, which punishes kidnaping for robbery.

Since a certain risk of injury is inherent in every robbery, all the circumstances surrounding the asportation must be examined to determine whether the movement increased that risk. A proper consideration of the dangers associated with the asportation would focus on the following factors: (1) the *distance* traveled; (2) the *duration* of the asportation; (3) the *mode* of asportation;<sup>198</sup> and (4) the degree of *change in locale*.<sup>199</sup> The risk of harm examination would measure the degree of severity of any dangers connected with these factors to determine whether the asportation constitutes simple kidnaping or aggravated kidnaping.

The risk of harm examination would eliminate the need for the two-prong test. This alternative approach would perform the function of the increased risk test, and a separate movement test would be unnecessary because that determination would be subsumed within the risk of harm examination. For example, a movement which increases the risk of injury has some significance in the crime. According to *Daniels*, a movement with criminological significance is not an incidental movement and therefore constitutes kidnaping.<sup>200</sup> The risk of harm examination could establish the *existence* of additional risks, thus deter-

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196. See *id.*

197. See text accompanying note 124 *supra*.

198. See, e.g., *People v. Ramirez*, 2 Cal. App. 3d 345, 82 Cal. Rptr. 665 (1969) (manner of detention included high speed auto chase resulting in fatal crash).

199. See, e.g., *People v. Curtis*, 21 Cal. App. 3d 704, 98 Cal. Rptr. 775 (1971) (asportation of victims resulted in removal from well-lighted intersection to deserted, dark place beneath freeway under construction).

200. See 71 Cal. 2d 1119, 1134-39, 459 P.2d 225, 234-38, 80 Cal. Rptr. 897, 906-10 (1969).

mining that the movement was more that incidental, as well as establishing the *degree* of any dangers.

Abandoning the two-prong test and adopting this alternative risk of harm examination is suggested both because it would facilitate analysis and, more importantly, because it would effectively incorporate the views of the court in *Daniels*. By abandoning the two-prong test, the judiciary would no longer be saddled with the arbitrary one-block definition of kidnapping. Under the risk of harm examination, the court would scrutinize the particular facts of each case to determine whether a movement constitutes kidnapping. This approach would involve precisely the type of inquiry envisioned by the court in *Daniels*.<sup>201</sup> Furthermore, the risk of harm examination would require sensitivity to all the circumstances and dangers arising from the asportation.

The suggested approach would not be drastically different from the present two-prong test. The alternative method would not redefine "kidnaps . . . to commit robbery," nor would it modify the *Daniels* court's interpretation of the legislative intent underlying the statutory proscription of this crime. Rather, a risk of harm examination would simply and properly apply the principles articulated by the court in *Daniels* to determine kidnapping for robbery.

### Conclusion

Some authorities consider section 209 to be an anomaly in California penal law.<sup>202</sup> They question, for example, why a kidnapping committed for the purpose of rape is only a simple kidnapping offense punishable under section 207, while a kidnapping for the purpose of robbery may be punished with the more severe sanction of the aggravated kidnapping statute, section 209. Yet a decision to delete kidnapping for robbery from section 209, or to expand the scope of the statute to encompass kidnappings committed with other criminal intents, is left to the legislature. Meanwhile, kidnapping for robbery continues as a California law which the courts should seek to apply as rationally as possible.

A risk of harm examination is a rational technique which provides a feasible approach to the problem of determining what constitutes kidnapping for robbery. Most important, this method would fulfill the objective of the court in *Daniels* by bringing reason and common sense to the law of kidnapping in California.

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201. See text accompanying notes 171-75 *supra*.

202. See, e.g., *In re Matson*, 33 Cal. App. 3d 559, 564, 109 Cal. Rptr. 164, 168 (1973).

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